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March 27, 2006

**VIA HAND DELIVERY**

The Honorable Charles Terreni  
Chief Clerk/Administrator  
South Carolina Public Service Commission  
101 Executive Center Drive, Suite 100  
Columbia, SC 29210

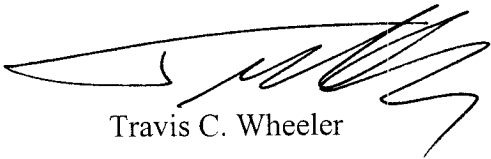
**Re:** South Carolina Electric & Gas Company Annual Review of Base Rates for Fuel Costs  
Docket No. 2006-2-E  
HSB File No. 04381.0237

Dear Mr. Terreni:

South Carolina Electric & Gas Company ("SCE&G" or the "Company") hereby files an original and ten (10) copies of the Return to Motion to Compel and Affidavits of the Company's witnesses, Joseph M. Lynch, Gerhard Haimberger, and John R. Hendrix. Please be kind enough to return a clocked copy via the bearer of this letter.

Thank you for your consideration in this matter. If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards,



Travis C. Wheeler

TCW/abm

enclosures

cc: Shannon Bowyer Hudson, Esquire  
E. Wade Mullins, III, Esq.  
Damon E. Xenopoulos, Esquire  
Scott Elliott, Esquire

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**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2006-2-E**

**IN RE:**

**South Carolina Electric & Gas Company  
Annual Review of Base Rates for Fuel Costs**

*Original*

**RETURN TO MOTION 1**

**I. INTRODUCTION**

CMC Steel South Carolina ("CMC") seeks an order compelling South Carolina Electric & Gas Company ("SCE&G") to disclose certain highly confidential coal and rail contracts, disclosure of which could seriously injure SCE&G's position in future negotiations with such providers. CMC also seeks disclosure of detailed, confidential information concerning SCE&G internal generation costs, information that if disclosed could put SCE&G and its customers at a significant competitive disadvantage in buying and selling power in regional power markets. CMC has provided no affidavit or other factual evidence establishing the need for this information nor of the relevance of any of it to the specific issues being litigated in this proceeding. In fact, disclosing this highly confidential and market sensitive information is of little if any necessity in the context of this case since: a) SCE&G has provided the parties extensive documentation of how its fuel costs were established; and b) the fuel cost calculations and all matters related to this discovery have been fully reviewed and audited by independent auditors from the Office of Regulatory Staff ("ORS"). All parties, including CMC, have now filed direct testimony that accepts the fuel cost calculations provided by ORS.

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PUBLIC SERVICE COMMISSION

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## II. LEGAL STANDARD

In evaluating CMC's Motion to Compel, the Commission must balance the potential harm to SCE&G from disclosure of the requested information with CMC's specific need for the information in light of the issues in contention in this case. Specifically, the South Carolina Supreme Court has held that a party "requesting protection from the court or commission must initially show good cause by alleging a particularized harm [that] will result if the challenged discovery is had." Hamm v. South Carolina Pub. Serv. Comm., 312 S.C. 238, 439 S.E.2d 853, 854 (1994) (citing Moore's Federal Practice ¶ 26.75 (2d. ed. 1993)). SCE&G has done so in the attached affidavits of Carl Klein, Gerhard Haimberger, and John Hendrix which are attached to this return. Once harm is shown, CMC as "the party seeking discovery must come forward and show that the information sought 'is both relevant and necessary to the case. When both parties meet their burden of proof, the court must weigh the opposing factors.'" Hamm, 312 S.C. 238, 439 S.E.2d at 854 (citing Moore's Federal Practice at ¶ 26-402).

In past cases, this Commission has dealt with similar attempts to force SCE&G to disclose work papers reflecting confidential information related to fuel cost calculations, plant operating characteristics, fuel procurement contracts, and market power contracts. The Commission has established the precedent of treating the fuel contracts and the work papers underlying fuel clause calculations as proprietary and not subject to discovery even under non-disclosure agreements. See In re Application of South Carolina Elec. & Gas Co. for Approval of an Increase in Elec. Rates and Charges, Docket No. 2004-178-E, Order No. 2004-475 (Oct. 8, 2004).

In Order No. 2004-475, in response to a motion to compel by Columbia Energy, the Commission ruled that "the actual contracts or work papers which are or were used by SCE&G in making these [fuel clause] adjustments" are "proprietary in nature and not subject to

disclosure under the Commission's regulations." Id., p. 3. The Commission required SCE&G to identify the contracts and work papers involved in these calculations, but ruled that the work papers and contracts themselves were confidential and that SCE&G could not be required to produce them. See id. In addition, the Commission ruled that SCE&G was not required to provide "contracts or detail of contracts" related to gas supply to its Jasper plant, nor was its required to provide confidential off-system power sales contracts. See id., pp. 4-5.

**A. SCE&G would suffer irreparable and particularized harm from the risk of disclosure of the information sought.**

**1. Rail contracts sought pursuant to SMI-2-7.**

CMC seeks disclosure of SCE&G's rail contracts. As demonstrated in the Affidavit of Gerhard Haimberger, these rail contracts and the information they contain are extremely competitively-sensitive documents. SCE&G's rail contracts are negotiated rate contracts. Negotiated rates are made available by the railroads to large customers as an alternative to tariff rates, which typically are significantly higher. (See Mar. 27, 2006 Affidavit of Gerhard Haimberger, ¶ 5, attached hereto as Exhibit "A"). These negotiated rate contracts are treated with the utmost confidentiality in the industry. (See id.). If SCE&G's negotiated prices or terms were understood to be subject to disclosure to other shippers, the railroads would very likely be reluctant to provide SCE&G with significant concessions in the future, since these concessions might be communicated to other potential shippers and would damage the railroads' competitive position in negotiating with other shippers. All customers would then expect the same concessions as a minimum "floor" to the deal offered by the railroad. Should this happen, SCE&G would be at a significant competitive disadvantage in negotiating rail agreements and SCE&G and its customers could lose millions of dollars in negotiated rail rate concessions. Additionally, coal suppliers would gain the freight rate basis differential among various rail origins, thereby being able to increase their coal price to the detriment of the ratepayer and SCE&G (See id., at ¶ 7).

Even the perception that negotiated contract rates might be disclosed to other rail customers would likely result in railroads being leery of providing SCE&G their most favorable rates. (See id., at ¶ 6). Even if disclosed to CMC's consultants under a protective order, SCE&G and its customers would not be adequately protected from the risk of competitive injury due to inadvertent disclosure or from the perception of the railroads that this information was now part of a consultant's database or that key terms could otherwise be signaled to potential shippers. (See id., at ¶ 9).

2. Domestic coal contracts sought pursuant to SMI-2-8.

CMC also seeks disclosure of SCE&G's proprietary domestic coal contracts. (See id., at ¶ 10). SCE&G has already provided CMC with its non-confidential coal contracts with offshore suppliers. (See id.). As with the rail contracts, coal contracts are held in strictest confidence in the industry. (See id., at ¶ 11). If SCE&G's coal contract prices or terms were believed to be subject to disclosure to other purchasers, coal suppliers would likely be reluctant to provide SCE&G with significant price concessions or other favorable terms in the future. As with railroads, the coal suppliers would believe that any concessions made to SCE&G could be communicated to other potential buyers and would serve as a floor for all future negotiations. Should this happen, SCE&G would be at a significant competitive disadvantage in future negotiations and SCE&G and its customers could lose millions of dollars in coal price concessions. (See id., at ¶ 13). Even if disclosed to CMC's consultants under a protective order, SCE&G and its customers would not be adequately protected from the risk of competitive injury due to inadvertent disclosure or from the perception of the coal suppliers that this information was now part of a consultant's database or that key terms could otherwise be signaled to potential buyers. (See id.).

3. Marginal cost data sought pursuant to SMI-4-36.

Finally, CMC requests detailed information about SCE&G's marginal cost of generating electricity. This information determines both the lowest price at which SCE&G will sell electricity on the open market, and the highest price SCE&G will pay when it seeks to purchase economy energy or emergency energy on the open market. This information is also deemed to be extremely confidential throughout the industry. (See Mar. 27, 2006 Affidavit of Carl Klein, ¶ 4, attached hereto as Exhibit "B"). Disclosure of this information could result in substantial damage to SCE&G's position as both a purchaser and seller of energy in unregulated regional energy markets. (See id., at ¶ 5). If other power marketers had access to SCE&G's incremental energy prices, they would know where SCE&G's lowest sales prices and highest purchase prices fell, and could adjust their bids accordingly. SCE&G could then be forced to buy and sell energy at less favorable rates. (See id.). Ultimately, end consumers would receive less benefit from energy sales and pay a higher cost for purchased energy if market participants knew SCE&G's incremental generation prices (the costs and revenues of these transactions are credited to SCE&G's native load customers). (See id.). Moreover, once this information was disclosed to the market, there would be no practicable way to undo the damage to SCE&G and its customers. (See id., at ¶ 7).

**B. CMC cannot demonstrate the requisite need for the information it seeks.**

CMC has not provided any affidavits or made any factual showing establishing that it needs this highly confidential information for purposes of effectively litigating issues in this fuel clause proceeding. While SCE&G has maintained all of the aforementioned contracts and price data in the strictest confidence and has allowed no contracts or marginal price information to be copied by outside parties, it has allowed ORS auditors to review all its coal and rail contracts on site and to audit all charges under them (without copies being made). (See Mar. 27, 2006 Affidavit of John Hendrix, ¶ 4, attached hereto as Exhibit "C"). ORS personnel have similarly audited SCE&G's fuel forecasts. ORS personnel have not found any issues that would change

the company's requested base fuel rate. (See id.). CMC and the other parties have not raised any objection to the conclusions of the ORS audits, nor do they allege any gaps in these audits.

To justify an order compelling disclosure of this information, CMC must show that the information "is both relevant and necessary to the case. When both parties meet their burden of proof, the court must weigh the opposing factors.'" Hamm, 312 S.C. 238, 439 S.E.2d at 854 (citing Moore's Federal Practice at ¶ 26-402). CMC has made no showing that the confidential information it is seeking is necessary to effectively argue its positions in this case. There is no reason justifying the disclosure of this information to CMC.

**C. Balancing of the parties' competing interests weighs in favor of nondisclosure.**

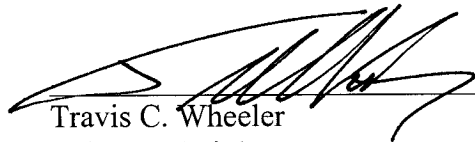
The damage to competition should this information be disclosed to outside parties would be severe and irreparable. The damage from disclosure is the threat of increased costs to consumers in the many millions of dollars. Because the potential harm to SCE&G and its customers from disclosure—whether voluntary, inadvertent, or perceived—so outweighs any proffered need for this information by CMC, the Commission should deny CMC's Motion to Compel Disclosure. An additional competing interest is that of the suppliers under the rail and coal contracts who are not before the Commission and are regulated by other governmental bodies or are unregulated commercial entities. Those entities could not be adequately protected by this Commission from the risk of competitive injury due to inadvertent disclosure or the signaling of key terms to potential buyers.

**CONCLUSION**

In past proceedings, this Commission has established the precedent of treating the types of contracts and information sought by CMC as proprietary and not subject to discovery. See In re Application of South Carolina Elec. & Gas. Co. for Approval of an Increase in Elec. Rates and Charges, Docket No. 2004-178-E, Order No. 2004-475 (Oct. 8, 2004). Such contracts and other proprietary information are deemed privileged for purposes of 26 S.C. Code Regs. 103-851(A).

See id. Moreover, in Hamm, the Supreme Court recognized the need to protect such information from inadvertent disclosure. See Hamm, 312 S.C. 238, 439 S.E.2d at 854. Because a protective order is insufficient to protect the interests of SCE&G and its customers and because CMC can demonstrate no real need for the information sought, this Commission should deny CMC's Motion to Compel.

Respectfully submitted,



Travis C. Wheeler

Belton T. Zeigler

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Patricia Banks Morrison, Esquire, Esquire

**South Carolina Electric & Gas Company**

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Date: March 27, 2006.



## **EXHIBIT A**

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

**DOCKET NO. 2006-2-E**

**In Re: South Carolina Electric &  
Gas Company Annual Review of  
Base Rates for Fuel Costs**

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**Affidavit**

The undersigned, Gerhard Haimberger, being duly sworn deposes and says that:

1. I am Gerhard Haimberger. I am General Manager-Fuel Procurement for SCANA Services, Inc. and am the executive charged with fuel purchasing on behalf of South Carolina Electric & Gas Company ("SCE&G" or the "Company").
2. I have reviewed the Motion to Compel Discovery Responses From South Carolina Electric & Gas Company as signed by Damon E. Xenopoulos, Esquire and E. Wade Mullins, Esquire, as the attorneys for CMC Steel South Carolina f/k/a SMI Steel – South Carolina (the "Motion to Compel").
3. The purpose of my affidavit is to explain the sensitivity and confidentiality of the information requested and referenced in Interrogatory SMI-2-7 and Interrogatory SMI-2-8. I will respond to these Interrogatories in order.
4. Interrogatory SMI-2-7 requests information regarding SCE&G's contracts with CSX and Norfolk Southern (the "Rail Contracts"). The Rail Contracts include business sensitive, strictly confidential information that the parties to the contract have agreed to keep confidential.
5. Rail Contracts contain particularly sensitive information and are treated as highly confidential throughout the industry. Rail providers negotiate freight agreements with industry as an alternative to higher priced tariff service. Rail providers will not provide their best price to a company in negotiations if they believe that price will be disclosed to other customers. Thus, disclosure of these Rail Contracts could result in a competitive injury to SCE&G and severely curtail its ability to obtain the best prices for its system. Disclosing freight rates also allows coal suppliers to capture coal origin freight basis differentials allowing them to increase their coal pricing.
6. Accordingly, if the terms of these Rail Contracts were disclosed either intentionally or inadvertently, or even if a rail provider suspected such disclosure was possible, SCE&G and its customers could suffer a competitive injury for a significant period of time.
7. The magnitude of the competitive injury could be in the many millions of dollars.

8. SCE&G has maintained these Rail Contracts in the strictest confidentiality and has not allowed any copies to be made by outside parties. However, SCE&G has allowed staff members of ORS to review the Rail Contracts on-site and audit all charges contained therein without copies being made.

9. As an expert in coal transportation and the procurement of coal, it is my opinion the risk of competitive injury, even if these Rail Contracts were disclosed pursuant to a confidentiality agreement, is significant and far outweighs the need for disclosure. Further, if the Rail Contracts were disclosed and the rail providers became aware of this breach, the injury to SCE&G could be long term and could not be adequately remedied by the Commission.

10. I reviewed SMI-2-8. This Interrogatory seeks information regarding SCE&G's coal contracts and contracts of coal suppliers (the "Coal Contracts"). I note that SCE&G has already disclosed and made available to the parties in this proceeding non-confidential contracts with off-shore suppliers.

11. The Coal Contracts contain highly sensitive, confidential information that cannot be divulged by any party to the contract. The information contained in these Coal Contracts is treated as sensitive, confidential, and strategic business information that must remain so in order for the contracting parties to maintain confidence and trust that is critical to conduct business in a competitive industry.

12. If coal suppliers believe the prices they provide to SCE&G could be disclosed to other potential purchasers, they will be reluctant to offer SCE&G their lowest prices. If price concessions to SCE&G were disclosed to others, the suppliers would be forced to offer similar concessions to all purchasers.

13. Thus, disclosure of these Coal Contracts, even pursuant to a confidentiality agreement, would not adequately protect SCE&G from inadvertent disclosure and the risk of significant competitive injury. Further, the potential for significant, long term competitive injury to SCE&G, and its customers, outweighs the need for disclosing the information contained in the Coal Contracts. If the information were to be inadvertently leaked, or believed to have been leaked, then the Commission would not be able to provide an adequate remedy to SCE&G. The cost to SCE&G's customers could be many millions of dollars.

14. Finally, both of these interrogatories seek highly sensitive information that throughout the industry is protected and held in the strictest confidence. Disclosure of this information would place SCE&G in serious jeopardy in terms of the potential for long-term competitive injury in the market place. These concerns, in my opinion, far outweigh the need for disclosure.

FURTHER, deponent sayeth naught.

Gerhard Haimberger  
Gerhard Haimberger

SWORN TO AND SUBSCRIBED BEFORE ME

This 27 day of March, 2006

Notchen Connelly (L.S.)

Notary Public for South Carolina

My Commission Expires: 3/18/2015

## **EXHIBIT B**

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

**DOCKET NO. 2006-2-E**

**In Re: South Carolina Electric &  
Gas Company Annual Review of  
Base Rates for Fuel Costs**

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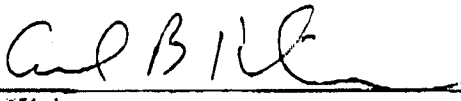
**Affidavit**

The undersigned, Carl B. Klein, being duly sworn deposes and says that:

1. I am Carl B. Klein. My current position is Manager of Economic Resource Commitment, SCE&G.
2. I have reviewed the Motion to Compel Discovery Responses From South Carolina Electric & Gas Company as signed by Damon E. Xenopoulos, Esquire and E. Wade Mullins, Esquire, as the attorneys for CMC Steel South Carolina f/k/a SMI Steel – South Carolina (the “Motion to Compel”).
3. The purpose of my affidavit is to explain the sensitivity and confidentiality of SCE&G’s hourly, daily, and monthly marginal costs as referenced in Interrogatory SMI-4-36.
4. The hourly, daily, and monthly marginal costs for the period at issue (the “Data”) are highly confidential, competitively sensitive data that are protected and treated as strictly confidential within the electricity industry.
5. Disclosure of these Data could result in the injury of SCE&G’s position as a purchaser and seller of electricity in the competitive energy markets. If power marketers had this information they would have knowledge of critical price points and cost information regarding SCE&G’s generation and upon which SCE&G bases purchase and sale decisions on the open market. With such inside information these marketers could bid for electricity accordingly, resulting in a competitive disadvantage to SCE&G. SCE&G’s customers receive the benefit of its sales and purchases so they are ultimately at risk if SCE&G is disadvantaged competitively.
- 6 Disclosure of these Data under protective order would not adequately protect SCE&G or its customers as the degree of harm from such disclosure far outweighs the need for this information. The Fuel Forecast and relative outputs of that forecast were fully audited by the ORS and detailed in the Response to Data Request ORS 1-3 and ORS has not taken exception with the results of the forecast.

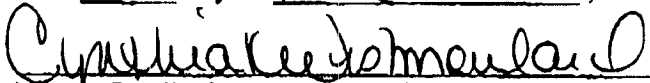
7 The risk of competitive injury, even if these Data were disclosed pursuant to a confidentiality agreement, is significant. Given the highly competitive nature of wholesale energy markets and the sensitivity of this information within the industry, the potential for injury to SCE&G and its customers could not be adequately remedied by ORS were there to be an inadvertent disclosure of this Data.

FURTHER, deponent sayeth naught.

  
\_\_\_\_\_  
Carl B. Klein

SWORN TO AND SUBSCRIBED BEFORE ME

This 27 day of MARCH, 2006

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 9-13-11

## **EXHIBIT C**



**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA**

**DOCKET NO. 2006-2-E**

**In Re: South Carolina Electric &  
Gas Company Annual Review of  
Base Rates for Fuel Costs**


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**Affidavit**

The undersigned, John R. Hendrix, being duly sworn deposes and says that:

1. I am John R. Hendrix. My current position is Manager of Electric Pricing and Rate Administration, SCANA Services, Inc.
2. I have reviewed the Motion to Compel Discovery Responses From South Carolina Electric & Gas Company as signed by Damon E. Xenopoulos, Esquire and E. Wade Mullins, Esquire, as the attorneys for CMC Steel South Carolina f/k/a SMI Steel – South Carolina (the “Motion to Compel”).
3. I have been directly involved with responding to discovery requests and the production of documents in the Docket referenced above. The purpose of my affidavit is to explain the information SCE&G has already provided prior to the receipt of the Motion to Compel.
4. SCE&G has provided copious amounts of discovery in this matter. Specifically, SCE&G responded to ORS 1-3 and South Carolina Energy Users Committee (“SCEUC”) SCEUC 1-1 with approximately 550 pages of source documents and work papers in each of these documenting SCE&G fuel forecasts and actual fuel cost data. Further, ORS audited the information provided in ORS 1-3 and SCEUC 1-1 and has not found any issues that would change the Company’s requested base fuel rate.
5. CMC Steel South Carolina has not shown adequate need for this information. SCE&G has accommodated discovery requests and provided voluminous information in this matter.

FURTHER, deponent sayeth naught.

  
\_\_\_\_\_  
John R. Hendrix

SWORN TO AND SUBSCRIBED BEFORE ME

This 27 day of March, 2006

Cynthia Lee Ishmael (L.S.)

Notary Public for South Carolina

My Commission Expires: 9-13-11



**BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA  
DOCKET NO. 2006-2-E**

**INRE:**

**South Carolina Electric & Gas Company  
Annual Review of Base Rates for Fuel Costs**

**CERTIFICATE OF SERVICE**

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via courier, *or by other delivery as indicated*, to all parties of record at the addresses shown below.

***Document(s):*** SOUTH CAROLINA ELECTRIC & GAS COMPANY'S RETURN TO MOTION TO COMPEL AND AFFIDAVITS OF JOSEPH M. LYNCH, GERHARD HAIMBERGER, AND JOHN R. HENDRIX

E. Wade Mullins, III, Esq.  
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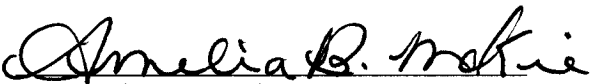
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COMMISSION

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By: 

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Date: March 27, 2006.